IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 14, 2006

STATE OF TENNESSEE v. JOHN STERLING LEWIS

Appeal from the Criminal Court for White County
No. CR-1680 Lillie Ann Sells, Judge

No. M2004-02450-CCA-R3-CD - Filed June 28, 2006

The Appellant, John Sterling Lewis, was convicted by a White County jury of driving under the influence ("DUI"), first offense. Following a sentencing hearing, the trial court imposed a sentence of eleven months and twenty-nine days, requiring service of six months in jail, and further ordered that the sentence was to be served at 100% before Lewis was eligible for work release, furlough, trusty status, or rehabilitative programs. On appeal, Lewis raises three issues for our review: (1) whether the evidence is sufficient to support the conviction; (2) whether the court imposed an excessive sentence by ordering six months confinement, by requiring 100% service, and by ordering that the sentence be served consecutively to an outstanding Cumberland County DUI sentence; and (3) whether the court had the authority to require Lewis to continue to report to the trial court for purposes of a status report notwithstanding his appeal of the case. Following review, the judgment of conviction and the six-month sentence are affirmed. However, because the trial court failed to make findings of fact with regard to consecutive sentencing, we remand the case to the trial court for a determination of whether consecutive sentencing is warranted in this case.

Tenn. R. App. P. 3; Judgment of Conviction and Sentence Affirmed;
Remanded for Determination of Consecutive Sentencing

DAVID G. HAYES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

David Brady, Public Defender; John B. Nisbet, III, Assistant Public Defender (on appeal); and Joe L. Finley, Jr., Assistant Public Offender (at trial), Cookeville, Tennessee, for the Appellant, John Sterling Lewis.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; William E. Gibson, District Attorney General; and Marty S. Savage, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

While on routine patrol in the early morning hours of September 14, 2003, Deputy Greg Sims of the White County Sheriff's Department observed a blue Toyota, with its brake lights on, located in the parking lot of DeRossett Market, a local convenience store. The car was sitting approximately eight to ten feet off the road and was not moving. Sims approached the vehicle, and he observed that the motor was running, the vehicle was in gear, and that the Appellant was leaned back in the driver's seat with his head down. Sims knocked on the window and, receiving no response, opened the car door. He had to shake the Appellant twice before getting any response. Following Sims' directions, the Appellant put the vehicle in park and exited the vehicle. However, it took the Appellant several minutes to successfully exit the vehicle, and he almost fell down, having to lean against the car for balance. Sims smelled a strong odor of alcohol both in the car and on the Appellant's breath and noted that the Appellant's speech was slurred. Because of the Appellant's condition, Sims did not feel that he would be able to perform any field sobriety tests safely. Sims then read the implied consent form to the Appellant, but the Appellant refused to take the breathalyzer test or sign the form. The Appellant was arrested for DUI and placed in Sims' patrol car. The Appellant became belligerent upon being told that the car was going to be towed because he claimed he had borrowed the car from friends.

On January 5, 2004, the Appellant was indicted by a White County grand jury for DUI, first offense. A jury trial was held on March 2, 2004, after which the Appellant was found guilty of DUI. A sentencing hearing was held on August 17, 2004, where evidence was introduced that the Appellant had two prior DUI convictions.[1] The trial court sentenced the Appellant to a term of eleven months and twenty-nine days, requiring service of six months in jail followed by six months of supervised probation. Additionally, the court ordered that the sentence would be served at 100% before the Appellant would be eligible for work release, furlough, trusty status, or rehabilitative programs, and the court further ordered that the sentence was to be served consecutively to an unserved Cumberland County DUI sentence. On September 20, 2004, the trial court denied the Appellant's motion for new trial. However, the court granted the Appellant's motion for bond pending appeal and ordered the Appellant to report back to the court on June 23, 2005, in order to review the Appellant's progress and status on appeal. Following the trial court's denial of his motion for new trial, the Appellant filed a timely notice of appeal.

Analysis

On appeal, the Appellant has raised three issues for our review: (1) whether the evidence is sufficient to support the conviction; (2) (a) whether the court imposed an excessive sentence by

[1] One of the DUI convictions occurred in 1991, and, because it was over ten years old, the conviction did not qualify for sentencing enhancement purposes. The second DUI conviction occurred in Cumberland County on January 15, 2005, and was first discovered when noted in the pre-sentence report.

ordering the Appellant to serve six months of his sentence in jail; (b) whether the court erred by ordering that the Appellant serve 100% of his sentence before being eligible for work release, furlough, trusty status, or rehabilitative programs; and (c) whether the court erred in ordering the sentence be served consecutively to an outstanding Cumberland County DUI sentence; and (3) whether the trial court had the authority to order the Appellant to report back to the trial court for a status or progress report.

I. Sufficiency of the Evidence

First, the Appellant asserts that insufficient evidence was presented to support a conviction for DUI. In considering this issue, we apply the rule that where the sufficiency of the evidence is challenged, the relevant question for the reviewing court is "whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see also* Tenn. R. App. P. 13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). This court will not reweigh or reevaluate the evidence presented. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

"A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

The Appellant was convicted under Tennessee Code Annotated section 55-10-401(a)(1) (2003), which provides that "[i]t is unlawful for any person to drive or to be in physical control of any automobile . . . on any of the public roads and highways of the state, . . . or any other premises which [are] generally frequented by the public at large, while: (1) [u]nder the influence of any intoxicant . . . ." Thus, the plain language of the statute provides that a person can be found guilty in one of two ways: (1) by driving or (2) by being in physical control of an automobile while intoxicated.

As the Appellant notes, there was no direct evidence presented that he actually drove the car. However, there is ample evidence that he was in physical control of the vehicle. Tennessee uses a totality of the circumstances test to evaluate whether the accused was in physical control of a vehicle within the meaning of the statute. *State v. Lawrence*, 849 S.W.2d 761, 765 (Tenn. 1993). In considering the extent of an accused's activity necessary to constitute physical control, the trier of

fact must take into account all of the circumstances, including, for example, the location of the defendant in relation to the vehicle, the whereabouts of the ignition key, whether the motor was running, the defendant's ability, but for his intoxication, to operate the vehicle, and the extent to which the vehicle is capable of moving under its own power. *Id*.

Applying the above factors to the facts of this case, there can be little dispute that the Appellant exercised physical control over the vehicle. Although the Appellant testified that he had not been driving the car and was simply watching the car for friends who had gone to pull another vehicle out of the mud, the jury was free to reject his testimony. *See Pappas*, 754 S.W.2d at 623. The jury was also free to reject the Appellant's testimony that, because the car was a hybrid vehicle, it would not idle without moving. Moreover, even if we were to assume the Appellant's statement was true, a finding of physical control could still be supported. The Appellant was located in the driver's seat of a car, with the motor running, and the car was in gear. Sims further observed that the brake lights of the car were activated, suggesting that the Appellant's foot was on the brake. Moreover, the car itself was in an operable condition, as it was driven from the scene by a police officer because no wrecker was available. Thus, all the factors enumerated in *Lawrence* weigh strongly in favor of finding physical control. We would note that convictions for DUI based upon physical control have been supported by much less evidence. *See State v. Butler*, 108 S.W.3d 845 (Tenn. 2003); *Lawrence*, 849 S.W.2d at 765; *State v. Melissa Roberts*, No. E2005-00760-CCA-R3-CD (Tenn. Crim. App. at Knoxville, Dec. 28, 2005). From the testimony presented, we conclude that the Appellant had the present physical ability to operate the vehicle, and, thus, was in physical control.

Moreover, there is no dispute that the vehicle was located in a convenience store parking lot, a place frequented by the public. Additionally, although the Appellant stated he had only a few drinks earlier in the day and was simply sleepy, from Sims' testimony, we conclude that the evidence was more than sufficient to support a finding that the Appellant was intoxicated. Sims stated that the Appellant smelled strongly of alcohol, had slurred speech, and was unsteady on his feet. Moreover, he was difficult to rouse, appearing passed out, and refused to take a breathalyzer test. Viewing the evidence in the light most favorable to the State, the evidence is sufficient for a rational jury to conclude that the Appellant was guilty of DUI.

II. Sentencing

(a) Excessive Sentence

Next, the Appellant contends that the trial court erred in ordering him to serve six months of his eleven month and twenty-nine day sentence in confinement. Specifically, he asserts that the sentence is too harsh and that the trial court failed to make the required statutory findings necessary to impose a sentence of incarceration above the minimum requirement. We disagree.

When an accused challenges the length, range, or manner of sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the

trial court are correct. T.C.A. § 40-35-401(d) (2003); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Ashby*, 823 S.W.2d at 169. The burden is on the defendant to show the impropriety of the sentence. T.C.A. § 40-35-401(d), Sentencing Commission Comments.

DUI, first offense, is a Class A misdemeanor. Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302 (2003), which provides, in part, that the trial court shall impose a specific sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. *State v. Palmer*, 902 S.W.2d 391, 394 (Tenn. 1995). More flexibility is extended in misdemeanor sentencing than in felony sentencing. *State v. Troutman*, 979 S.W.2d 271, 273 (Tenn. 1998).

Our legislature has provided that a defendant convicted of first offense DUI "shall be confined . . . for not less than forty-eight hours nor more than eleven months and twenty-nine days." T.C.A. § 55-10-403(a)(1) (2003). In effect, the DUI statute mandates a maximum sentence for a DUI conviction, with the only function of the trial court being to determine what period above the minimum period of incarceration established by statute, if any, is to be suspended. *State v. Combs*, 945 S.W.2d 770, 774 (Tenn. Crim. App. 1996).

Although otherwise entitled to the same considerations under the Sentencing Reform Act as a felon, the misdemeanor offender is not entitled to the presumption of a minimum sentence. *State v. Seaton*, 914 S.W.2d 129, 133 (Tenn. Crim. App. 1995) (citations omitted). Rather, in sentencing the misdemeanor defendant, the trial court shall fix a percentage of the sentence that the defendant must serve in confinement before being eligible for release into rehabilitative programs. T.C.A. § 40-35-302(d). The trial court shall consider the sentencing principles and enhancement and mitigating factors in determining the percentage to be served and "shall not impose such percentages arbitrarily." *Id.*; *see also Troutman*, 979 S.W.2d at 274. Additionally, a misdemeanor sentence, as opposed to a felony sentence, contains no sentencing range. Moreover, the trial court is not required to make explicit findings on the record, as a sentencing hearing is not mandatory. T.C.A. §40-35-302. Accordingly, in misdemeanor cases, the trial judge, who is able to observe firsthand the demeanor and responses of the defendant while testifying, must be granted discretion in arriving at the appropriate sentence.

In this case, the trial court imposed the eleven month and twenty-nine days sentence with all but six months to be served on probation; thus, we are confronted with the question of whether such a period of incarceration is justified based upon the principles of sentencing and the nature and circumstances of the offense. *See State v. Gilboy*, 857 S.W.2d 884, 889 (Tenn. Crim. App. 1993). Despite the Appellant's assertion to the contrary, the trial court made explicit findings of fact with regard to the sentence imposed:

> Observing [the Appellant] at trial and his testimony and observing [the Appellant] and his testimony today, the court finds first of all as an enhancement

> factor the defendant has a previous history of criminal convictions and the court is placing a great deal of weight on that today in this driving under the influence case. That is the only enhancement the court finds today.
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> The court finds no mitigating circumstances today.
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> The court makes these notes here.
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> . . . .
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> Whether or not this defendant might reasonably be expected to successfully be rehabilitated. Again, I went back to my notes to refresh my memory and in observing the defendant today and his statements and considering that, the court doesn't reasonably expect this defendant to be successfully rehabilitated. . . .
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> The court is to consider whether or not it reasonably appears the defendant would abide by the terms of probation, I don't think so, based on the fact that his age and he doesn't take responsibility for his actions. I think that's one of the major things I see with this defendant here in the courtroom. A man of his age has a drinking problem, has an alcohol problem. Instead of him coming forth and saying, you know, I really have a problem, I need to get help with this problem, we're still in here fussing today, arguing today about the jury's verdict, taking no responsibility.

After review, we find nothing in the record which leads us to disturb the trial court's decision regarding the Appellant's sentence. Clearly, a reading of the trial court's findings indicates that the court did in fact consider the enhancement and mitigating factors, as well as all the relevant sentencing principles as required by statutory law. As such, the presumption that the court's sentencing determinations are correct must apply. Moreover, we note that the court's findings of enhancement factor (2), a previous history of criminal convictions, is supported by the record. As the court noted, this factor weighed heavily as this was the Appellant's third conviction for DUI, one of the convictions occurring only months prior to the instant conviction. Additionally, the court specifically noted that the Appellant admitted at the sentencing hearing that he had not reported his subsequent conviction to his probation officer. Further, the court noted that the Appellant's potential for rehabilitation was limited because of his attitude with regard to his conviction. These findings are more than sufficient to support imposition of a period of six months incarceration. The Appellant has provided no proof to the contrary; thus, he has failed to carry the burden of establishing that his sentence is not proper. Accordingly, we conclude that the trial court did not err in ordering the Appellant to serve six months of his sentence in confinement.

(b) Illegal Sentence/100% Service

Upon imposing the sentence in this case, the trial court pronounced: "It is a one hundred percent sentence, it's eleven months twenty nine days at a rate of a hundred percent. I am ordering

in this case that the [Appellant] serve six months in this case and then he'll be on supervised probation for the remaining six months . . . ."[2] The Appellant contends that the trial court erred in ordering that the sentence be served at 100% prior to the Appellant being eligible for work release, furlough, trusty status, or rehabilitative programs. The Appellant argues that Tennessee Code Annotated section 40-35-302(d) precludes the imposition of a sentence of 100% service. In relevant part, the statute provides:

> In imposing a misdemeanor sentence, the court shall fix a percentage of the sentence which the defendant shall serve. After service of such a percentage of the sentence, the defendant shall be eligible for consideration for work release, furlough, trusty status and related rehabilitative programs. The percentage shall be expressed as zero percent (0%), ten percent (10%), twenty percent (20%), thirty percent (30%), forty percent (40%), fifty percent, (50%), sixty percent (60%), seventy percent (70%) but not in excess of seventy-five percent (75%). . . .

T.C.A. § 40-35-302(d). The Appellant asserts that because the statute expressly provides that the percentage of service shall not exceed 75%, the trial court's imposition of 100% service results in an illegal sentence.

While the Appellant's argument initially appears to have merit, it ignores the prior case law which holds that, unlike general misdemeanor sentencing in which a trial court is not permitted to require confinement in excess of 75%, a trial court is authorized to require a DUI offender to serve 100% of his sentence in confinement. *State v. Allen Prentice Blye*, No. E2001-01375-CCA-R3-CD (Tenn. Crim. App. at Knoxville, Nov. 1, 2002) (citing *Palmer*, 902 S.W.2d at 393-94). In addressing whether DUI offenders must be sentenced in accordance with the sentencing act, our supreme court noted that:

> the legislature has specifically excluded DUI offenders from the provisions of the [Sentencing Reform] Act when the application of the Act would serve to either alter, amend, or decrease the specific penalties provided for DUI offenders. A trial judge may designate a service percentage in a DUI case under Tennessee Code Annotated Section 40-35-302(d) but that percentage may not operate to reduce the mandatory minimum sentencing provisions of the DUI statute.

Palmer, 902 S.W.2d at 394. Thus, a DUI offender can be sentenced to serve the maximum punishment for the offense so long as the imposition of that sentence is in accordance with the principles and purposes of the Criminal Sentencing Reform Act of 1989. As noted, the trial court properly considered the principles and purposes of the Act in imposing the sentence in this case; thus, we find no error in the imposition of the sentence.

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[2]The judgment form reflects a sentence of eleven months and twenty-nine days with service of six months in confinement at 100%.

Additionally, the Appellant asserts that the 100% sentence is illegal because it would deny him entitlement to good conduct credits. We disagree. It is undisputed that if the Appellant earns good conduct credits, as authorized by Tennessee Code Annotated section 41-2-111 (2003), these credits will not be diminished by the imposition of a 100% sentence. *See State v. Clark*, 67 S.W.3d 73, 78 (Tenn. Crim. App. 2001) (holding that good conduct credits apply to misdemeanor DUI sentences). Nonetheless, the Appellant's entitlement to good conduct credits does not preclude the trial court from setting a 100% service requirement. The court specifically noted in *Clark* that "although the trial court was authorized to set the DUI sentence at one hundred percent, the defendant is entitled to good conduct sentence credits so long as they do not reduce his confinement below that required for the mandatory minimum DUI sentence . . . ." *Id*. Thus, while the Appellant is entitled to the credits, if earned, his sentence, as imposed, is not illegal.[3]

Also related, but not specifically challenged within the Appellant's argument of 100% service, is the question of whether entitlement to the so called "two for one" work credit provisions of Tennessee Code Annotated sections 41-2-123 and 41-2-146 are controlled by the sentencing court. While these two specific statutes fall outside the Sentencing Act, Tennessee Code Annotated 41-2-147 expressly provides that "[t]he sheriff or administrative authority having responsibility for the custody of any person sentenced to a local jail or workhouse pursuant to the provisions of . . . § 40-35-302, . . . shall, when such person has become eligible for work related programs pursuant to such section[], be authorized to permit such person to perform any of the duties set out in § 41-2-123 or § 41-2-146." We construe the phrase "has become eligible for work-related programs pursuant to [40-35-302(d)]" to mean that the inmate may be authorized to participate in such programs only after he or she has served the fixed percentage of the sentence as set by the court.[4] Thus, the trial court controls the eligibility to participate in these programs to the extent that the court fixes the percentage of confinement required before participation in the "two for one" work programs is permitted. As such, the Appellant in this case will be ineligible to receive work-related credits because his service percentage was set at 100 percent.

(c) Consecutive Sentencing

The Appellant also argues that the trial court erred in ordering that his sentence be served consecutively to an unserved DUI sentence imposed in Cumberland County. He contends that the trial court failed to place findings on the record to support the imposition of consecutive sentencing

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[3]For instructional purposes, see Op. Tenn. Att'y Gen. No. 96-061 (Apr. 4, 1996) (county jail inmate serving split confinement of six months followed by probation may earn good conduct credits or authorized work program credits toward the six months, but not both).

[4]Tennessee Code Annotated section 41-2-123(b)(1) (2003) permits "the prisoner to work on the county roads or within municipalities within the county on roads or on parks or public property." This statute further provides that the prisoner's sentence shall be reduced by two days for each day worked on the road. *Id*. at (b)(3). Tennessee Code Annotated section 41-2-146(a) (2003) permits "the prisoner to participate in work programs." It also provides that the prisoner's sentence shall be reduced by two days for each one day worked.

as required by *State v. Wilkerson*. We must agree. In its pronouncement, the trial court simply stated that the sentence was "to run consecutive to the Crossville case."

A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. Rule 32(c)(2), Tenn. R. Crim. P., specifically states that the "judgment to make the sentences consecutive or concurrent shall explicitly recite the judge's reasons therefor, and is reviewable on appeal."

The Appellant contends that the trial court failed to make the requisite findings of fact in order to support a finding that the Appellant was a dangerous offender. We agree and further note that the court did not specifically find that any of the section 40-35-115 factors necessary to impose consecutive sentencing existed. Thus, review of the record does not support a finding that the trial court addressed the necessary sentencing considerations as required by statute. The purpose of recording the court's reasoning with regard to imposition of a sentence is to guarantee the preparation of a proper record for appellate review. *State v. Ervin*, 939 S.W.2d 581, 584 (Tenn. Crim. App. 1996). The absence of findings serves to preclude our statutorily mandated *de novo* review of the consecutive sentences. Accordingly, remand is necessary in this case.

III. Court's Authority to Order Reporting Following Filing of Appeal

Lastly, the Appellant asserts that the trial court was without authority to require him to continue to report to the trial court after the notice of appeal was filed. At the conclusion of the motion for new trial hearing, the trial court stated: "on June the 23rd, 2005, you will have [the Appellant] back with us and we'll kind of keep tabs on his appeal case. Mr. Lewis, let me just sign an order to be back on June 23rd at 9:00, 2005, and we will see where your appeal is at that point." A Non-Minute Order for Appearance reflecting that the Appellant was to report on June 23rd was filed on September 20, 2004. The Appellant filed his notice of appeal on September 29, 2004.

The Appellant is correct in that when a "defendant convicted of a misdemeanor and sentenced to probation appeals his conviction to the appellate courts of this state, his sentence is automatically stayed pending the outcome of his appeal." *State v. Lyons*, 29 S.W.3d 48, 49 (Tenn. Crim. App. 1999). However, the Appellant's reliance on *Lyons* is misplaced. As the State points out, the trial court's order was entered prior to the filing of the notice of appeal while the trial court retained jurisdiction over the Appellant. Nothing in the record indicates actual compliance with the order. It is the Appellant's duty to prepare an adequate record in order to allow a meaningful appellate review. Tenn. R. App. P. 24(b). Moreover, the date the Appellant was ordered to report has long since passed, thus, rendering any error moot.

CONCLUSION

Based upon the foregoing, the Appellant's DUI conviction and resulting six-month sentence are affirmed. However, the imposition of consecutive sentencing is vacated, and the case is

remanded to the trial court for determination of whether consecutive sentencing is appropriate and entry of findings of fact supporting that determination.

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DAVID G. HAYES, JUDGE